(Not To be Destroyed)

"B" of Rules"

App. F. IX-4

*Previous References*

37/146-36 (1-3)

1938-39
(5.7.)

File No. 25-38

Serial Nos. 1

*Letter References*

Private

P.15
(E)

# GENERAL AND REVENUE. SECRETARIAT.

*Serial Nos.* One

**Part B for** August 38

**SUBJECT.**

Protection afforded from loss as a result of Securities by Fraud.

Comptr's report with encls referred to be recorded & preserved.

WD 0295—GPB—22,500—18-8-37

G.J-25-38-1 922/38

OFFICE OF THE COMPTROLLER TO THE GOVERNMENT
OF HIS HIGHNESS THE MAHARAJA OF MYSORE.

No. 177/S.I. Confidential.

Bangalore, Dated 14th July 1938.

FINANCIAL SECRETARY 288 14 JUL 1938 GOVT. OF MYSORE

FINANCIAL SECRETARY 16 JULY 1938 GOVT. OF MYSORE

From

A. N. RAGHAVACHAR, Esq., M.A.,
*Comptroller to the Government of*
*His Highness the Maharaja of Mysore,*
*Bangalore.*

To

Rajasevanipuna
S. Shamanna, Esqr, B.A.,
Financial Secretary to the Government of
His Highness the Maharaja of Mysore,
Bangalore.

Sir,

Protection of Government from loss on their Securities by fraud.

In inviting your kind reference to your letter No. Fl 3767-G.F. 146-36-3 of the 3rd/5th December 1936, on the above subject, I have the honour to forward herewith for the information of Government a copy of letter No. D/4379-F dated 5th July 1938 received from the Under Secretary to the Government of India, Finance Department together with a copy of the judgment delivered by the Privy Council in the appeal filed by the Government of India, in the case in question against the Bank of Indai, Ltd.

Having regard to the favourable judgment of the Privy Council and the decision of the Government of India in regard to their securities no further action seems called for in our State either.

I have the honour to be,

Sir,

Your most obedient servant,

A. N. Raghavachar
Comptroller.

Subject for perusal. May be sent to Law Dept also for perusal. The judgment removes a serious handicap which would have affected the negotiation of Govt Securities.

H. Secy)

A. yr. AR 6.8.38 BR 26-7-38.

Addl. Secy., Law, WJC

BR 6.8.38 For perusal BR 6.8

Addl Secy)

922

2

This is an important and interesting judgment of the Privy Council in regard to rewards of Govt Pro. notes under The Securities Act. Their Lordships' Law Lord Held That in a case where a promise has been renewed by the Govt, The person applying for renewal is under an implied Contract to indemnify the Govt if the act turns out to be injurious to the rights of a third part., e.g. where the person applying for renewal has purchased the promote with a forged endorsement of the real owner over the Govt. It has been held That this implied obligation to indemnify holds good even though the officer renewing Govt Lave taken an indemnity bond under Sec 21 of the Securities Act but omitted to do so. The provisions under our Securities Act are similar to the Indian Securities Act

(Finance Member)

OFFICE OF THE
FIRST MEMBER OF COUNCIL
U 9 1938
No. 1666

FINANCIAL
1 AUG. 1938
GEN. & REV.

8738

Fin: Br)

Serial No.

Sub to be perused of notes & orders on the previous page.

19/V Mk This work to be recorded & preserved."

H. Secy.)

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R f
Mk V ~~~

NOTE—Contn. Sheet.

Letter No. D/4379-F dated the 5th July 1938 from the Under Secretary to the Government of India, Finance Deptt. Simla, to the Comptroller in Mysore, Bangalore

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Subject - Protection of Government from loss on their securities by fraud.

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With reference to the correspondence ending with your letter No.1993/S.L dated the 15th February 1938 on the subject indicated above, I am directed to forward herewith a copy of the judgment delivered by the Privy Council in the appeal filed by the Government of India in the case the Bank of India Limited Versus the Secretary of State. As the judgment is in favour of the Government of India it is not proposed to take any further action in the matter.

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Copy

M. Narasimhachar

Superintendent
Comptroller's Office.

5

PRIVY COUNCIL APPEAL NO. 55 of 1937

THE SECRETARY OF STATE — APPELLANT

Vs

THE BANK OF INDIA, LIMITED — RESPONDENTS

FROM

THE HIGH COURT OF JUDICATURE AT BOMBAY

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JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, delivered the 2nd May 1938

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Present at the Hearing

Lord Wright

Sir Shadi Lal

Sir George Rankin

(Delivered by Lord Wright)

---

This is an appeal from a judgment of the High Court in appeal at Bombay, which affirmed a judgment of Wadia,J as trial Judge. These judgments rejected the claim of the appellant to be indemnified by the respondents against a liability which he had incurred and been compelled to -- satisfy under the circumstances of the case which were - - shortly as follows- A lady named Gangabai was the indorsee and holder of a Government Promissory Note for Rs 5,000/-. A broker named Acharya, having possession of the note on the lady's behalf, forged her indorsement to it in his favour and indorsed it for value to the respondents. The respondents - acting in good faith, applied to the Public Debt Office under the Indian Securities Act, 1920, to have a renewed promissory note payable to them issued in exchange for the note which -- the respondents gave up in exchange. The lady, becoming - -

aware of the fraud practised by Acharya, and the dealing with her note on the part of the respondents and the -- appellant, which constituted a conversion of her property by either or both as well as by Acharya, sued the appellant in conversion and recovered the appropriate damages. The appellant then brought the present action against the -- respondents, claiming to be indemnified against the loss thus sustained by him on the principle that the Public Debt Office had issued the renewed note at the request of the -- respondents and was accordingly entitled to be indemnified against the damage resulting from the fact that what had been done involved an injury to a third party's rights. So far as the renewed note was concerned it was rightly accepted on both sides before their Lordships that it constituted a new contract between the Government and the respondents, - which was not affected by the circumstances under which it was issued and certain contentions raised in the Courts below were abandoned by the appellant. Only questions of -- liability and of principle were argued before their Lordships matters of amount being left for subsequent settlement if the necessity should arise.

It is convenient first of all to refer to the material sections of the Indian Securities Act, 1920, which having replaced the repealed Act of 1886 dealing with the same -- matters, now regulates the legal position of these Government Promissory Notes. Such notes circulate in large numbers in India; hence the importance to the parties and to the Indian public generally of the question of principle involved in this appeal. It appears from the print of the note in question contained in the record, that the note was originally issued in 1854 and payable to a named payee or order. The actual note in question was a renewal note which had been issued in April, 1925. On its back spaces had been provided for 10 indorsements. The forged indorsement occupied the fifth space, and Acharya's indorsement to the respondents occupied

the sixth space. At the foot of these spaces was a receipt signed by the respondents for a renewed note in lieu of the note. It is clear that the system of renewing notes is largely used in ordinary practice. It is obviously convenient to have a clean note, in addition to the circumstance that in the course of years the spaces available for indorsements become exhausted. And the holder of a renewed note, obtains a new promise from the Government free from any equities or disputes which might have attached to the prior note. Section 16 of the Act provides in terms that a renewed Government promissory note is to be deemed to -- constitute a new contract between the Government and the person to whom it is issued and all persons deriving title through him.

The Act contains express provisions for regulating the issue of renewed notes. In particular section 12 provides that subject to the provisions of Section 13, a person claiming to be entitled to a Government promissory note may on applying to the prescribed officer and on satisfying him of the justice of his claim and delivering the promissory note receipted in the prescribed manner, and paying the -- prescribed fee, if any, obtain from such officer a renewed promissory note payable to him. Section 13 deals with a case where there is a dispute as to the title to one of these notes, and enables the officer to refuse to act save on a judicial decision or on the result of a formal enquiry. Section 21, on which the judgment under appeal was based, provides that notwithstanding anything in certain specified sections, including section 12, the prescribed officer -- might in any case arising, (i) issue a renewed security -- upon the applicant giving the prescribed indemnity against the claims of all persons claiming under the security so -- renewed, or (ii) refuse to issue a renewed security unless

such indemnity is given. Rules have been made under the Act to "prescribe" the indemnity which may be exacted, which is to be a bond of the applicant with two sureties in double the face amount of the note.

In the present case the Government officer when issuing the renewed note to the respondents, did not exact a security under Section 21. The question is whether the appellant is debarred from relying on an indemnity implied under the common law of India which in this respect is identical with that of England. The statement of the principle under which such an indemnity is implied is stated by Lord Halsbury L.C. in Sheffield Corporation Vs Barclay (1905) A.C. 392, to be correctly expressed in a quotation from counsel's argument in Dugdale Vs Lovering, L.R. 10 C.P. 196, which runs as follows :-

> " It is a general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns out to be injurious to the rights of a third party, the person doing it is entitled to an indemnity from him who requested that it should be done ".

This principle, which in England must now be read in connection with recent legislation as to contribution between tortfeasors, is of the widest general application. It is often, as in the statement by Lord Davey in the same case, to which reference will shortly be made, said to be based on a contract implied by law, the request importing a promise to indemnify the other party against the consequences to him of acting upon the request. But in the words adopted by Lord Halsbury, it is merely said that the person is entitled to an indemnity. The fiction of a contract implied by law adds nothing, though it may seem to justify the Court in holding as a matter of law that the party is entitled to the indemnity on the basis that the assertion by the applicant of his request is the offer of a

a promise to indemnify if the other party acts upon that request to his damage. Sir William Jowitt has contended that the necessary elements are the assertion and the action taken upon that assertion by the other party. He has -- contended that neither element is present in the case of the performance of a statutory duty like that in question. There was, he says, no assertion by the respondents but only a claim in respect of which the Government official had to act on his own responsibility and judgment. His conduct, it is said, was not ministerial, but judicial or semi-~~official~~ judicial, since the statute by section 21 gave him the right to refuse the renewed note except on the terms of his being granted the prescribed indemnity. Reliance was particularly placed on the form in which the rule was stated by Lord Davey in Sheffield -- Corporation Vs Barclay (Supra) at p. 399 where Lord Davey thus stated the principle :-

> " I am further of opinion that where a person invested with a statutory or common law duty of a ministerial character is called upon to exercise that duty on the request, direction, or demand of another (it does not - seem to me to matter which word you use) and without any default on his own part acts in a manner which is apparently legal but is, in fact illegal and a breach of the duty, and thereby incurs liability to third parties thee is implied by law a contract by the person making the request to keep indemnified the person having the - duty against any liability which may result from such - exercise of the supposed duty. And it makes no difference that the person making the request is not aware of the invalidity in his title to make the request ~~is not aware~~ or could not with reasonable diligence have discovered it."

It seems that it was on this,line of reasoning that Wadia J. decided in favour of the respondents. Beaumont C.J. (with whose judgment Rangnekar J. agreed) was not prepared to accept this reasoning, but preferred to rest his decision upon a different ground which will be explained later in this judgment. Their Lordships are with respect unable to agree with Wadia J. Lord Davey, in their opinion, did not mean, when he used the word "ministerial" to indicate that

the act done must be done without any element of choice deliberation or decision on the part of the doer. All, it seems, that he meant was that the official had no -- interest except to perform his statutory duty. But the mere performance of that duty may involve some degree of deliberation and judgment. Thus in the Sheffield case, which dealt with the requesting of transfers of stock in the Corporation's register, the indemnity was implied though section 30 (1) of the Sheffield Corporation Act of 1883 provided that "the Corporation or the registrar before allowing any transfer of stock may, if the circumstances of the case appear to them or him to make it expedient, require evidence of the title of the person claiming a right to make the transfer". Similarly in A.G. Vs Odell (1906) 2 Ch. 47, the Court of Appeal were it seems, prepared to hold that a person who, acting in good faith, brought to the Land Registry a transfer apparently executed by the registered proprietor of the piece of land, but in fact a forgery, became subject to a contract implied by law to indemnify the person whose duty under the Land -- Transfer Acts was to register transfers against any liability resulting from the exercise of the duty. There may indeed be cases where the person charged with the statutory duty is also charged with the responsibility of deciding in a judicial or quasi-judicial capacity whether it is proper to exercise the duty in any particular case, so that he could not be regarded as acting on the applicant's request, but solely on his own statutory responsibility. Such cases which are contemplated as possible in A.G. v. Odell (supra) would depend on the particular construction of the particular statutes, but would involve considerations which are different from those presented in Sheffield Corporation V Barclay (supra) or A.G. Vs Odell (supra). It is on the analogy of these latter authorities that in their Lordships' judgment the present case must be determined. There is

nothing anomalous in the presence of some element of choice or deliberation on the part of the officer who is the person doing the act, so long as he proceeds on the assertion or claim or direction or evidence of the applicant Indeed, in the simpler type of case illustrated by Dugdale V. Lovering (supra) it is not necessary that the plaintiff should have been other than a free agent,. He may act on the defendant's request not under compulsion but of choice That does not, however, deprive him of the right, if the circumstances are appropriate, to the implied indemnity, though no doubt he may waive the right. Similarly, where the duty is statutory and must be performed if the statutory conditions are fulfilled, the fact that the official may have to see that these conditions are fulfilled, does not per se debar him from saying that he has acted upon the -- assertion or claim or request of the applicant. In this connection Beaumont C.J. says " If he (the prescribed officer) acts upon the request, I doubt if it is relevant to say that he has also considered the matter for himself" Their Lordships agree in this with the Chief Justice except that they do not prima facie regard it as a matter of doubt.

This view is fortified by considering the language of section 12, which clearly puts the onus on the applicant: "A person claiming to be entitled to a Government promissory note may (that is, is entitled) on applying to the prescribed officer and on satisfying him of the justice of the claim and delivering the promissory note receipted in the - - prescribed manner and paying the prescribed fee, if any" obtained the renewed note. "Claiming " involves an - - assertion of title, the act of applying is the applicant's act, "satisfying" is, as Mr. Willink pointed out, in the active not passive and is a condition to be fulfilled by the applicant. These matters clearly, in their Lordships' judgment, constitute a request, from which the common law

indemnity may properly be prima facie implied, none the less because some deliberation may be involved on the part of the officer before he submits to be satisfied by what the applicant puts before him.

But the Chief Justice held that the common law indemnity could not be implied under this Act because of Section 21, which in his judgment excludes any implied indemnity because it gives a right to demand an express indemnity and to -- refuse to give the renewed note unless an express indemnity is given. He thought that the express provision by section 21 of the statutory right is inconsistent with the existence of an implied right if the section is not acted upon. He concluded that the Legislature must be deemed to have intended that there should not be a right of indemnity in every case, but only under the special conditions of section 21. Their Lordships are, with respect, unable to accept this view. As a matter of construction they do not accept the view that section 21 has not merely the positive effect of giving the special right which it provides for, but has also the negative effect of cutting out the implied right of indemnity undoubtedly, in their judgment, existing under the Act of 1886, which embodied the law on this matter until it was repealed and replaced by the Act of 1920. A statute is prima facie to be construed as changing the law to no greater extent than its words or necessary intendment require Section 21 was not in the Act of 1886. If it had been -- intended by the insertion of that section in the Act of 1920 to abrogate the common law indemnity existing under the repealed Act, the Legislature would, it seems, have used words clearly expressing that intention, so as to secure that save as provided by section 21, there should be no -- right of indemnity. Their Lordships see no reason to -- justify reading in or implying such words. On the contrary they ~~constitute~~ construe section 21 as giving an added

statutory right, which is different from and in no way inconsistent with the common law right. That latter right is not complete merely because the officer has acted upon the request; to make it effective it is necessary that a further condition should be fulfilled, namely, that in the words used in Dugdale v Lovering (supra) that "the act should turn out to be injurious to the rights of a third party ". Thus the common law right is required in a case where the officer, though satisfied by the applicant when he issues the renewed note of the justice of hic laim, is wrongly satisfied. Though both he and the applicant were acting in perfect good faith and without suspicion, they may be, as they were in this case, unconsciously infringing the rights of the true owner of the note, and guilty of converting it. Cases in which the common law implies the indemnity are generally cases when the officer would not have thought of demanding an indemnity under section 21 These are mostly, if not always, cases where the risk is due to the fraud of some other person. Section 21 if construed as it is by the Chief Justice, would put the burden of this risk on the Government, unless in every case the officer exacted the statutory indemnity under Section 21. This, however, would place a serious and unnecessary burden on the course of renewing these notes which is a practice in constant use and to be facilitated not obstructed. On the construction which their Lordships think is, merely as a matter of construction correct the common law indemnity would be operative in the cases presumably rare on the average, where it turns out -- eventually to be wanted because of some concealed fraud. On the other hand, the officer would generally exercise the right to require the express indemnity before issuing the renewed note, wherever he can say that he is satisfied but still he is conscious that tthere are circumstances

of doubt or otherwise which lead him to refuse to issue the renewed note without the express indemnity. It may be noted that under section 21 what can be demanded as a condition of issuing the renewed note is the "prescribed" indemnity which under the rules prescribed under the statute is to be the bond of the applicant with two -- sureties for twice the amount of the note. This is -- obviously different from the common law indemnity. It may further be observed that if the matter were to be decided on the basis of the equities between the parties, the loss would more properly, it seems, be borne by the -- respondents, who have thought fit in the course of their business which they carry on for profit, to purchase the note from Acharya on the forged indorsement and have -- assumed the responsibility of putting forward the note as being their own property, whereas the Governmentofficer has merely performed his statutory duty in a ministerial capacity on the claim and assertion of the respondents. There is, in their Lordship's judgment, every reason why the Court should imply an indemnity in this case and no sufficient reason why they should treat section 21 as excluding that implication. It is no doubt true that if an express indemnity were exacted under section 21 it would exclude any implied or tracit indemnity. But that is a different matter from construing section 21 as -- removing from the scope of the statute the possibility in a proper case of the implied indemnity where no express indemnity has been required.

For all these reasons their Lordships are of opinion that the appeal should succeed, that the judgments of the Courts below should be set aside and that it shdould be adjudged that the appellant recover from the respondents the proper amount under his claim and should also have the costs of this appeal and his costs in the Courts --

below. If the parties can agree what is the proper amount it can be inserted in the Order in Council; if they cannot agree the case must be remitted to the High Court at Bombay to assess the amount.

They will humbly so advise His Majesty.

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Copy

M. Narasimhachar

Superintendent
State Loans Section
Comptroller's Office

GOVERNMENT OF HIS HIGHNESS
THE MAHARAJA OF MYSORE.

**General and Revenue Secretariat**

Requisition for papers

Section G. F. 1

A

B

Filed

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Serial No. 3

To be put up Diary No. 2208 of 1941.

Signature Narayana

Branch A&F

Section P&S.

Date 10. 1. 42.

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